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IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 558

EVERLASTING DEVELOPMENT CORPORATION, LONG CORPORATION, and L. D. LONG, *Petitioners*,

v.

SOL LUIS DESCARTES, JORGE J. JIMENEZ, VICENTE GEIGEL POLANCO, MARIANO VILLARONGA, RAMON COLON TORRES, FERNANDO SIERRA BERDECIA and JUAN A. PONS, as members of the Executive Council of Puerto Rico, and VICENTE GEIGEL POLANCO, as Attorney General of Puerto Rico, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Everlasting Development Corporation, Long Corporation, and L. D. Long, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review here the decision and judgment of that court rendered on November 2, 1951, in the case of *Everlasting Development Corporation, Long*

Corporation, and L. D. Long, appellants, v. *Sol Luis Descartes, Jorge J. Jiminez, Vicente Geigel Polanco, Marino Villaronga, Ramon Colon Torres, Fernando Sierra Berdecia, and Juan A. Pons, as members of the Executive Council of Puerto Rico, and Vicente Geigel Polanco, as Attorney General of Puerto Rico, appellees,* the same being numbered 4572 on the docket of said court.

OPINIONS BELOW.

The opinion of the Court of Appeals (Record 33-42) was rendered on November 2, 1951 and will be found in 192 F. 2d 1 (Fed. Rep. Advance Sheet, December 17, 1951). A petition for re-hearing was filed on November 29, 1951, and was denied on November 30, 1951 (Record 43). The opinion and judgment of the District Judge (Record 12) is found in 95 F. Supp. 954.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED.

1. Whether the principle established by this Court in *Bell* v. *Hood,* 327 U. S. 678 and prior decisions, requires a federal court to take jurisdiction in a case where the complaint plainly charges a violation by defendant officials of a territorial government of rights guaranteed to the plaintiff by the Constitution and laws of the United States, where there is no finding that the claim of a federal right asserted is immaterial or wholly insubstantial and frivolous.

2. Whether the Butler Act, 48 U. S. C. 872, which provides that "no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico,"

(a) Is applicable to a proceeding for declaratory judgment wherein no relief is sought for the purpose of restraining the assessment or collection of a tax;

Or, if applicable to such a declaratory judgment proceeding,

(b) Whether the Butler Act operates to deprive the United States District Court for Puerto Rico of jurisdiction in a case where the plaintiffs have no remedy whatsoever under the laws of Puerto Rico.

3. Whether, where a district court has, without consideration of the merits, dismissed a complaint for lack of federal jurisdiction, a federal court of appeals, in a case where it has no original jurisdiction, has authority to disregard the jurisdictional question and affirm the judgment on the ground the allegations of the complaint are insufficient to state a cause of action on which relief can be granted by a federal court.

STATUTES INVOLVED.

1. Section 16 of the Industrial Tax Exemption Act of Puerto Rico, Act No. 184, approved May 13, 1948, Laws of Puerto Rico 1948, which provides:

> "All resolutions and findings of the Executive Council and of the Governor of Puerto Rico under the provisions of this Act, shall be final, and no judicial or administrative proceeding shall lie against the same."

2. Section 2 of the Organic Act of Puerto Rico (48 U. S. C. 737), which is as follows:

> "The rights, privileges and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of Section 2 of Article IV of the Constitution of the United States."

3. The Butler Act (48 U. S. C. 872), which provides as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

STATEMENT OF THE CASE.

The Everlasting Development Corporation and the Long Corporation, each a Puerto Rican corporation, and L. D. Long, a citizen of South Carolina and a resident of Puerto Rico, individually and as a stockholder of the named corporations, filed a proceeding for declaratory judgment in the United States District Court for Puerto Rico, naming as defendants Sol Luis Descartes, Jorge J. Jiminez, Vicente Geigel Polanco, Mariano Villaronga, Ramon Colon Torres, Fernando Sierra Berdecia, and Juan A. Pons as members of the Executive Council of Puerto Rico, and Vicente Geigel Polanco, as Attorney General of Puerto Rico (Record 2-3).

The amended complaint alleges that each of the corporate plaintiffs is entitled to tax exemption in excess of $3,000.00 under the provisions of the Industrial Tax Exemption Act of Puerto Rico,[1] and that the defendants, as members of the Executive Council of Puerto Rico, empowered under said Act to pass upon applications for tax exemption, with intent to discriminate against the plaintiffs, determined and agreed to deprive, and did in fact deprive the plaintiffs of the tax exemption to which they are entitled, by failing to consider the facts presented before the special master appointed in the case and by deny-

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[1] Act of Puerto Rico No. 184, approved May 13, 1948, Puerto Rico Laws 1948, page 348. Section 16 of this Act is set forth at page 3, *supra*. Although the court below included in its opinion a lengthy summary of the principal provisions of this Act (Record 34-37), we do not believe that the provisions other than Section 16 were relevant to the appeal or that they have any relevance to the questions presented by this petition for certiorari.

ing the plaintiffs' application for tax exemption upon the sole basis of an opinion rendered by the Attorney General of Puerto Rico, which opinion they well knew to be erroneous; thus depriving the plaintiffs of their property without due process of law, denying them equal protection of the laws, and subjecting them to unequal and discriminatory taxation in violation of the Fifth Amendment to the Constitution of the United States and of the Organic Act of Puerto Rico (Record 2-9).

It was further alleged that the plaintiffs do not have any further administrative remedy and no remedy whatsoever in the courts of Puerto Rico (Record 9).

The prayers were that the court enter a judgment declaring that the plaintiffs are eligible for and entitled to tax exemption under the Industrial Tax Exemption Act of Puerto Rico, and that the denial of tax exemption to the plaintiffs by the defendants constitutes a denial to them of equal protection of the laws, deprives them of their property without due process of law and subjects them to unequal and discriminatory taxation (Record 9).

The District Judge, without considering the merits, dismissed the complaint for lack of federal jurisdiction, holding that the court was deprived of jurisdiction by the Butler Act, 48 U. S. C. 872 (Record 12-26).

Without passing on the jurisdictional issue determined by the District Judge (Record 33), the Court of Appeals reviewed the allegations of the complaint, considered the merits of the allegations, and affirmed the judgment of the lower court upon the ground "that the factual allegations of the complaint do not make out a case arising under the Constitution or laws of the United States, and that consequently the court below did not have jurisdiction of the subject matter" (Record 34).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In failing to follow, and give effect to the principle of, the decision of this Court in *Bell* v. *Hood*, 327 U.S. 678, by reversing the judgment of the District Court and remanding the case for a judgment on the merits.

2. In failing to hold (a) that the Butler Act is not applicable to a proceeding for declaratory judgment wherein no relief is sought for the purpose of restraining the assessment or collection of a tax; and (b) that the Butler Act in no event deprives the United States District Court for Puerto Rico of jurisdiction in a case where the plaintiffs have no remedy whatsoever under the laws of Puerto Rico.

3. In deciding the case on the basis of the sufficiency of the factual allegations of the complaint, a question which was in no way involved in the decision of the District Court, and in failing to pass on the jurisdictional issue as to the applicability of the Butler Act as a bar to the instant action, the issue on which the decision of the District Court was based.

4. In looking to the merits of the allegations of the complaint and affirming the judgment of the District Court on the ground the allegations are insufficient to state a cause of action on which relief can be granted by a federal court, despite the fact jurisdiction of the complaint had not been taken by the District Court.

REASONS FOR GRANTING THE WRIT.

1. The Judgment of the Court of Appeals, Affirming the Judgment of the District Court, Is in Direct Conflict With the Decision of This Court in Bell v. Hood, 327 U. S. 678, and Decisions Prior Thereto.

The District Court dismissed the complaint on the ground that it was deprived of jurisdiction by the Butler Act, 48 U.S.C. 872 (Record 12-26). The Court of Appeals,

however, ignored that question, and affirmed the judgment of dismissal on the ground "that the factual allegations of the complaint do not make out a case arising under the Constitution or laws of the United States, and that consequently the [District Court] did not have jurisdiction of the subject matter" (Record 34), or, as it was later stated, because "the factual allegations of the complaint fall far short of setting forth a substantial federal claim within the jurisdiction of the [District Court] under 28 U.S.C. § 1331" (Record 41-42).

Although these statements are such as to give the decision of the Court of Appeals the appearance of having been rendered upon a jurisdictional ground, it is apparent, when the decision is read as a whole, that the Court of Appeals was in fact disregarding the jurisdictional issue and deciding the case solely on its view of the legal sufficiency of the complaint to state a claim upon which relief could be granted.

After an exhaustive review of the allegations of the complaint in conjunction with the provisions of the Industrial Tax Exemption Act of Puerto Rico, the court below pointed out that whether the plaintiffs' operations come within those provisions "is a matter of statutory interpretation, as to which it can hardly be said that the language of the Act is crystal-clear" (Record 38), and finally reached the point on which it rested its decision (Record 41):

> • • • And so the plaintiffs here, in order to bring their case within the jursidiction of the court below under 28 U.S.C. § 1331, have alleged in the complaint that the action of the Council deprived the plaintiffs of the equal protection of the laws. However, something more than the mere pleading of such an ultimate conclusion of law is necessary to bring the complaint within 28 U.S.C. § 1331.
>
> It is true the complaint alleges that the defendants intended to discriminate against these plaintiffs when the Council denied their application after having granted tax exemption to other applicants entitled

thereto. This is no more than an allegation that the defendants, having granted tax exemption to other applicants, intended to treat these plaintiffs differently. But it is not a denial of the equal protection of the laws in a constitutional sense where the administrative body, upon an erroneous interpretation of a local statute, denies a tax exemption to one person after having lawfully and properly granted tax exemption to other persons differently situated. There must be a purposeful discrimination against one person and in favor of another person in like case, with no rational basis for a differentiation between the two. The complaint in the case at bar, however, carefully refrains from alleging that tax exemption has been granted to other persons in like case with the plaintiffs, engaged in the mass production of low-cost housing.

We contend that the above quoted excerpt from the opinion clearly shows that the decision of the Court of Appeals, when stripped to its essentials, is based solely on the proposition that the allegations of the complaint are insufficient to state a cause of action on which relief can be granted. The judgment of the court below is thus in direct conflict with *Bell* v. *Hood,* 327 U.S. 678, 681, 682, wherein this Court, in clear and unmistakable language, laid down the principle that where a complaint in a federal court is so drawn as to seek recovery directly under the Constitution or laws of the United States, the court must entertain jurisdiction, except (1) where the alleged claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisditcion or (2) where it is wholly insubstantial and frivolous.

In that case this Court held that a complaint setting up a claim for damages for violation of plaintiff's rights under the Fourth and Fifth Amendments gave the district court jurisdiction, and the case was remanded for a judgment on the merits even though that judgment should dismiss

the complaint for failure to state a cause of action. See *United States* v. *Williams*, 341 U.S. 58, at 66.

The judgment is also in direct conflict with the principle laid down by this Court in *Binderup* v. *Pathe Exchange*, 263 U.S. 291, at 305-306:

> * * * A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way it may decide as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. * * *

Even before *Bell* v. *Hood* and *Binderup* v. *Pathe Exchange, supra*, it was well settled that a complaint setting forth a claim for an amount in excess of the statutory minimum, arising under the Constitution or laws of the United States, presents a case within the jurisdiction of the federal courts, and that this jurisdiction cannot be made to stand or fall depending upon whether the claim ultimately is held good or bad. *Swafford* v. *Templeton*, 185 U. S. 487, 493; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 258-259.

The District Court expressly excluded the merits from its consideration in reaching its decision in this case (Record 26). And the court below, even after an exhaustive review of the complaint, did not find the claim of federal rights "so unsubstantial or devoid of merit as to make it frivolous * * *." See *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, at 258. Instead, although the complaint alleges in substance that defendants had arbitrarily and capriciously determined and agreed to deprive and had deprived plaintiffs of the tax exemption to which they

were entitled, and that pursuant to that agreement they had not only delayed their decision contrary to the mandate of the statute, but had also made their decision without reference to the facts in the case and on the basis of an opinion by the Attorney General of Puerto Rico (himself a defendant) which all the defendants well knew to be erroneous (Record 6-7), the Court of Appeals characterized this merely as a case "where the administrative body, upon an erroneous interpretation of a local statute, denies a tax exemption to one person after having lawfully and properly granted tax exemption to other persons differently situated" (Record 41).

We submit that a complaint alleging in substance that a group of insular officials who are charged with the duty of passing on applications of tax exemption conspired to deprive certain applicants of the tax exemption to which they were entitled, pursuant to which conspiracy they rendered an adverse decision on the applications without reference to the facts in the case and on the basis of an opinion by one of their number which all the conspirators knew to be erroneous, plainly states a claim of a denial of equal protection of the laws and a deprivation of property without due process of law. Though perhaps loosely drawn and wanting in some factual allegations, the complaint is so drawn as to seek relief directly under the Constitution and laws of the United States, and clearly the claim of federal rights asserted is neither immaterial nor insubstantial and frivolous.

The denial of jurisdiction in a comparable case was deemed to raise a jurisdictional issue of sufficient importance to require certiorari. *Bell* v. *Hood*, 327 U. S. 678, at 680. The opinion in *Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U. S. 246, 249, decided last term, illustrates the necessity for constant vigilance on the part of this Court to prevent lower courts from confusing the question whether jurisdiction exists with the question whether the complaint states a cause of action, in cases where jurisdic-

tion depends on subject matter. The error of the court below in this respect is so flagrant as to require review by this Court to prevent a dilution of the proper standards for determining federal jurisdiction.

The case at bar is a proceeding for declaratory judgment and in its final analysis the complaint seeks merely a declaration to the effect that the plaintiffs are not, as a matter of law, ineligible for tax exemption under the Industrial Tax Exemption Act of Puerto Rico.

The case made by the complaint is analogous to the case of *McGrath* v. *Kristensen*, 340 U. S. 162.

In the *Kristensen* case, the Attorney General had refused to grant Kristensen a stay of deportation upon the ground he was, as a matter of law, ineligible for naturalization, where eligibility for naturalization was a condition precedent to the exercise by the Attorney General of the power to suspend deportation.

In the case at bar, the Executive Council of Puerto Rico has denied the plaintiffs' application for tax exemption upon the basis of an opinion rendered by the Attorney General of Puerto Rico to the effect that plaintiffs are, as matter of law, ineligible for tax exemption.

In the *Kristensen* case, this Court held that "where an official's authority to act depends upon the status of the person affected, * * * that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies." 340 U. S. at 169.

In the case at bar the complaint shows that the status of the plaintiffs, with respect to eligibility for the tax exemption denied them by the defendants, is in dispute and that they have no administrative remedy (Record 9).

Plaintiffs having no remedy whatsoever under the laws of Puerto Rico, makes the case one for federal jurisdiction. Cf. *Hillsborough* v. *Cromwell*, 326 U. S. 620.

As in the *Kristensen* case, a declaratory judgment could be entered in the case at bar which would prevent the denial

of plaintiffs' right on an erroneous interpretation of the law, without in anywise interfering with any discretion which the Executive Council or the Governor of Puerto Rico may have in the premises. Cf. *Perkins* v. *Elg*, 307 U. S. 325.

2. The Judgment of the District Court Presents Jurisdictional Questions of Great Importance Which Ought to be Settled, None of Which Was Decided by the Court of Appeals.

Although the complaint alleges that the plaintiffs "have no further administrative remedy, nor any remedy whatsoever in the insular court of Puerto Rico" (Record 9), and although the Puerto Rican statute under which the defendants acted to deprive the plaintiffs of their constitutional rights expressly prohibits any administrative or judicial review,[2] the District Judge refused to take jurisdiction of the case on the ground the court was deprived of jurisdiction by the Butler Act[3] (Record 12-26).

The ruling of the District Judge was, we submit, tantamount to a holding that the Government of Puerto Rico has the power by statute to deprive a citizen of the United States of the right to question in the courts of Puerto Rico a violation of his constitutional rights by officials of the Puerto Rican government, and to leave him without any tribunal whatsoever with jurisidiction to protect him.

The question of whether or not the Butler Act deprives the District Court of jurisdiction was the principal question presented by the appeal, and although the Court of Appeals recognized the fact that the District Judge based his judg-

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[2] Section 16, Industrial Tax Exemption Act of Puerto Rico: "All resolutions and findings of the Executive Council and of the Governor of Puerto Rico under the provisions of this Act shall be final, and no judicial or administrative proceeding shall lie against the same."

[3] 48 U. S. C. 872: "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court for Puerto Rico."

ment dismissing the complaint on the prohibition of the Butler Act (Record 33), it did not decide or even discuss the question.

The question of whether or not the Butler Act is applicable to a proceeding for declaratory judgment wherein no relief is sought for the purpose of restraining the assessment or collection of a tax, and the question of whether or not the Butler Act in any event deprives the District Court of jurisdiction in a case where the plaintiffs have no remedy under the laws of Puerto Rico, are, we respectfully submit, important questions of federal law which ought to be settled by this Court.

The Court of Appeals specifically noted in *Paul Smith Const. Co.* v. *Buscaglia*, 140 F. 2d 900, at 901, that it had never been called upon to decide whether the Butler Act, despite its unqualified language, was subject to implied exceptions, as where the taxpayer was without an adequate remedy at law. Yet even though that question was squarely presented on the appeal in this case, the court below failed to answer it.

The rulings of the United States District Court for Puerto Rico on this question can hardly be considered clear-cut or decisive. A previous district judge stated in *Boyce* v. *Buscaglia*, 77 F. Supp. 753, at 756, that he was "not prepared to hold that the Butler Act was intended to prevent this Court from taking jurisdiction of a case such as this provided it is clearly shown that there is otherwise no adequate remedy." Even in the case at bar the District Court did not face the issue squarely, but rather evaded it by holding that plaintiffs did have an adequate remedy at law. Its reasoning was that although Section 16 of the Industrial Tax Exemption Act purports to bar any judicial review of the findings of the Executive Council, nevertheless it is beyond the legislative power thus to prevent judicial inquiry into the acts of administrative agencies (Record 19). Such reasoning is obviously fallacious in view of this Court's holding in *Mountain States Co.* v. *Public Service Commission*, 299 U. S. 167, 170.

There are two sound reasons why the Butler Act is not applicable to the case at bar.

A. In the first place, the Butler Act is by its terms applicable only to suits brought "for the purpose of restraining the assessment or collection" of a tax imposed by the laws of Puerto Rico, and the case at bar is a proceeding for declaratory judgment in which no relief is sought for the purpose of restraining the assessment or collection of a tax.

B. In the second place, even if the Butler Act were applicable to a proceeding for declaratory judgment wherein no relief is sought for the purpose of restraining the assessment or collection of a tax, it would not operate to deprive the District Court of jurisdiction of the case at bar for the reason the complaint shows that plaintiffs have no remedy whatsoever under the laws of Puerto Rico.

—A—

Butler Act not applicable to case at bar because no relief sought for purpose of restraining the assessment or collection of a tax.

The case at bar is a proceding for declaratory judgment, and no relief is sought for the purpose of restraining the assessment or collection of a tax.

The Butler Act by its terms applies only to suits "for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico."

The Act being one imposing a limitation on the powers of the courts, it should be strictly construed and given no meaning beyond that demanded by the specific language employed therein. A holding that the Butler Act is applicable to a proceeding for declaratory judgment wherein no relief is sought for the purpose of restraining the assessment or collection of a tax, would be legislation, not judicial interpretation.

The phraseology of the Butler Act is not unique in the history of Congressional legislation and the interpretation of the words "restrain" and "restraining", as employed in enactments other than the Butler Act, is of great significance. Historically, the statutes in which these words have been employed have been held to apply only to suits wherein injunctive relief is sought, and not to proceedings for declaratory judgment such as the case at bar. For example, R.S. 3224 [now 26 U.S.C. 3653 (a)], the language of which is virtually identical with that of the Butler Act, was held not applicable to proceedings for declaratory judgment wherein no injunctive relief was sought. *Penn* v. *Glenn*, 10 F. Supp. 483, 486 (W.D. Ky. 1935); *F. G. Vogt & Sons* v. *Rothensies*, 11 F. Supp. 225, 231 (E.D. Pa. 1935).

As a result of these decisions, Congress, in 1935, amended the Declaratory Judgment Act so as to make it inoperative insofar as suits involving federal taxes are concerned. Congress did not, however, see fit to make the Act inoperative as to suits involving either state or territorial taxes. See *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 301.

This Court in the *Huffman* case found it unnecessary to inquire whether the terms of the Johnson Act withdrawing jurisdiction "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law should be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax, but cautioned that "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." 319 U.S. at 299.

In *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623, the *Huffman* case was characterized as holding "that the policy which led federal courts of equity to refrain from enjoining the collection of allegedly unlawful state taxes should likewise govern the exercise of their discretion in withholding relief under the Declaratory Judgment Act." From this

it would appear that as to declaratory judgment actions in cases involving state taxes the Johnson Act does not bar jurisdiction, but instead confirms a policy in respect to the district court's decision in exercising that jurisdiction.[4]

Since the Johnson Act does not absolutely bar a district court from taking jurisdiction of an action for declaratory judgment involving the validity of a state tax, it should follow that the similar provisions of the Butler Act do not bar the United States District Court for Puerto Rico from taking jurisdiction of a declaratory judgment action involving the validity of a Puerto Rican tax. So far as we have been able to determine, there has been no decision interpreting this aspect of the Butler Act. In the single reported case in which the Butler Act was invoked in a proceeding for a declaratory judgment the appellant conceded for the purposes of the appeal that "if the District Court could not have granted an injunction * * *, then the court in the appropriate exercise of its discretion might properly have denied relief by way of declaratory judgment" (*Paul Smith Const. Co.* v. *Buscaglia*, 140 F. 2d 900, at 901); therefore, the question now raised was not actually presented for decision.

We respectfully submit that in view of the construction which the courts have consistently placed on statutes similar in language to the Butler Act, and in view of the fact that in making the Butler Act inoperative as to suits involving federal taxes, Congress manifested an intention of leaving the Declaratory Judgment Act applicable to suits involving state and territorial taxes where relief by way of injunction is not sought, the Butler Act cannot properly be held to be applicable to the case at bar.

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[4] Decisions of lower courts are in conflict. *West Pub. Co.* v. *McColgan*, 138 F. 2d 320, 325 (C. C. A. 9, 1943), and *Collier Advertising Service* v. *City of New York*, 32 F. Supp. 870, 872 (S. D. N. Y. 1940), hold that the ban of the Johnson Act includes a suit for declaratory judgment even where an injunction is not sought. *Morrison-Knudsen Co.* v. *State Board of Equalization*, 35 F. Supp. 553, 555 (D. Wyoming 1940), sets forth a contrary conclusion.

—B—

Even if Applicable to a Proceeding for Declaratory Judgment, the Butler Act Would Not Deprive the Court of Jurisdiction for the Reason That Plaintiffs Are Without a Remedy Under the Laws of Puerto Rico.

The complaint alleges that the plaintiffs "have no further administrative remedy and no remedy whatsover in the insular courts of Puerto Rico" (Record 9), and the Industrial Tax Exemption Act itself expressly denies them any remedy.

Section 16 of the Industrial Tax Exemption Act of Puerto Rico provides (Record 37):

> All resolutions and findings of the Executive Council and of the Governor of Puerto Rico under the provisions of this Act, shall be final, and no judicial or administrative proceeding shall lie against the same.

Since Section 16 has not been declared unconstitutional by the courts of Puerto Rico, we cannot treat it as nonexistent. This statute plainly denies any remedy in the insular courts, and until it has been authoritatively condemned a plain, speedy, and efficient remedy cannot be predicated upon the possibility that it may hereafter be declared ineffective. *Mountain States Co.* v. *Public Service Commission*, 299 U.S. 167, 170.

It is true that the Butler Act, 48 U.S.C. 872, unlike the Johnson Act, 28 U.S.C. 1341 (which contains a similar prohibition with respect to restraining the assessment or collection of state taxes), does not in express terms make its provisions inapplicable in cases when no "plain, speedy and efficient remedy" exists. However, under the decisions of this Court cited below, it seems clear that the Butler Act must, nevertheless, be construed to be applicable only in cases where a plain, speedy and efficient remedy exists under the laws of Puerto Rico.

The language of the Butler Act is almost identical with that of 26 U.S.C. 3653(a) [formerly R.S. 3224], as appears from the following comparison:

> [Except as otherwise provided] no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (26 U.S.C. 3653(a)).
>
> No suit for the purpose of restraining the assessment or collection of any tax *imposed by the laws of Puerto Rico* shall be maintained in *the District Court of the United States for Puerto Rico.* (Butler Act, 48 U.S.C. 872; italics supplied.)

It will be seen that the provisions of these two statutes here relevant are identical with the exception of the insertion in the latter of the words "imposed by the laws of Puerto Rico" and the substitution of the words "the District Court of the United States for Puerto Rico", for the words "any court".

This being true, 26 U.S.C. 3653(a) and the Butler Act are subject to the same construction, and this Court has in a number of instances held that the former is without application where a plain, speedy and efficient remedy does not exist. E.g., *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509-510; *Allen* v. *Regents of University of Georgia*, 304 U.S. 439, 449.

In the *Miller* case, this Court pointed out that R.S. 3224 (now 26 U.S.C. 3653(a)) is merely declaratory of the rule generally followed by courts of equity that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality, and said (284 U.S. at 509) that although the statute does not specifically refer to the generally recognized exception to that rule, i.e., that it is *not* applicable in cases involving exceptional circumstances, nevertheless, "the general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress in-

tended to abrogate that salutary and well established rule" (meaning the exception to the rule above stated.)

In the *Allen* case, this Court again expressly held that R.S. 3224 "is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law." 304 U.S. at 449.

An impelling reason why the courts should place the same construction on the Butler Act which this Court placed on R.S. 3224 in the *Miller* and *Allen* cases is that in adopting the Butler Act, it was unquestionably the intention of Congress to give to Puerto Rico the same protection from injunction which is afforded the States under R.S. 3224, and nothing more.

This is clearly shown by the explanation made on the floor of the Senate by Senator Bingham at the time the Butler Act was being considered (68 Cong. Rec. 5025):

> "I will state that the change in the existing law is this: The Organic Act of Porto Rico *does not carry to Porto Rico the general statutes of the United States.* Consequently, it has been possible and has proved an extremely dangerous thing in the government of Porto Rico for taxpayers to secure an injunction against paying Porto Rican taxes in the court of the United States. * * * *This amendment is to apply the same rule in Porto Rico that now applies on the continent of the United States.*" (Italics supplied.)

The rule to which Senator Bingham referred as then applying "on the continent of the United States", was the rule long followed by federal courts of equity, and expressed in R.S. 3224, that an injunction will not be granted to restrain the assessment or collection of taxes where the taxpayer has a plain and adequate remedy at law, which rule is, however, subject to the equally well established exception enunciated and applied by this Court in the *Miller* and *Allen* cases above cited, i.e., that the courts *will* intervene and grant injunctive relief in such cases where no plain and adequate remedy exists.

It is significant that later when Congress came to enact the Johnson Act, it expressly included as a part of that statute the exception applied by this Court in the cases above cited.

Certainly, Congress did not intend to adopt a rule for Puerto Rico more liberal than that which applies to the States, for there can be no reason why, in the exercise of its powers of taxation, a territorial possession such as Puerto Rico should be subject to less surveillance by the federal courts than one of the sovereign states of the Union. To the contrary, both logic and political policy impel the conclusion that since a territory is a political unit of inferior sovereignty, it should be subject to even greater federal control than one of the sovereign states. This conclusion has been reached by the courts in a number of instances:

> * * * the theory of the relation between the federal government and the states of the Union does not encourage or justify the independent equity interference with the laws of the states *that would be deemed reasonable, necessary, and justifiable in respect to a possession like Porto Rico.* (Italics supplied.)
>
> *Benedicto* v. *West India, etc. Tel. Co.,* 256 Fed. 417, at 419 (C.C.A. 1, 1919).
>
> * * * There is no interference with the insular courts by the District Court of the United States for Puerto Rico in the same sense as between state courts and federal courts, as the insular courts and the District Court of the United States for Puerto Rico were both created by the same act and have no independent source of existence.
>
> *Munoz* v. *Porto Rico Light & Power Co.,* 83 F. 2d 262, at 267 (C.C.A. 1, 1936); cf. *Stainback* v. *Mo Hok Ke Lok Po,* 336 U.S. 368, 377.

There can be no basis for a contention that in adopting the Butler Act, Congress intended to deprive the United States District Court for Puerto Rico of jurisdiction in a

case such as the one at bar where the taxpayer is afforded no remedy whatsoever under the laws of Puerto Rico.

3. The Decision of the Court of Appeals Is on the Merits and Amounts to an Unauthorized Exercise of Original Jurisdiction by an Appellate Court.

As we have pointed out above (*supra*, pp. 6-8), the decision of the Court of Appeals is based solely on the proposition that the allegations of the complaint are insufficient to state a cause of action on which relief can be granted.

The court below did not pass on any of the jurisdictional questions presented by the appeal.

It did not pass on the question of whether or not the District Court is required to take jurisdiction in a case where the complaint is so drawn as to seek relief directly under the Constitution and laws of the United States and the claim of federal rights asserted is neither immaterial nor wholly insubstantial and frivolous.

It did not pass on the question of whether or not the Butler Act is applicable to a proceeding for declaratory judgment wherein no relief is sought for the purpose of restraining the assessment or collection of a tax, and where the plaintiff is without any remedy whatsoever, under the laws of Puerto Rico.

The Court of Appeals simply confused the question of jurisdiction with the question of sufficiency of the allegations of the complaint to state a cause of action.

The former question is one to be determined solely from the *form* of the complaint and the *intention of the pleader* as disclosed by the allegations. The latter question cannot be determined except by inquiry into the *merits* of the allegations *after*, and not before, jurisdiction is assumed. *Bell v. Hood*, 327 U. S. 678.

We recognize the general principle that an appellate court has the power to affirm a judgment of a lower court on a ground or theory other than that on which the judg-

ment of the lower court is predicated. However, a court of appeals has no original jurisdiction, and where, as in the case at bar, the lower court has refused to take jurisdiction and has dismissed a complaint for lack of jurisdiction, a court of appeals is without power to determine a question which the lower court itself could have determined only by the exercise of jurisdiction. The powers of a court of appeals are solely those of an appellate court, and it can pass on the merits of a cause only by way of review. *Stephenson* v. *Equitable Life Assur. Soc.*, 92 F. 2d 406, 410 (C. C. A. 4, 1937). Where the district judge did not pass on the merits but dismissed the cause for lack of jurisdiction, the merits are not before the court on the appeal and only the jurisdictional question is before the appellate court. *Mississippi Power & Light Co.* v. *City of Jackson*, 116 F. 2d 924, 926 (C. C. A. 5, 1941), certiorari denied, 312 U. S. 698; *Purcell* v. *Summers*, 126 F. 2d 390, 395-396 (C. C. A. 4, 1942), certiorari denied, 317 U. S. 640; cf. *Tripplehorn* v. *Cambron*, 250 Fed. 605 (C. C. A. 6, 1918).

The decision of the court below is in conflict with all the authorities cited above as to the proper scope of review on appeal of a case which was dismissed by the district court for lack of jurisdiction. Moreover, it is in conflict with the decision of this Court in *Bell* v. *Hood, supra*, where the complaint was drawn to state a claim arising under the Constitution, and this Court reversed a judgment of dismissal for lack of jurisdiction and remanded the case for a judgment on the merits even though that judgment should dismiss the complaint for failure to state a cause of action. See *United States* v. *Williams*, 341 U. S. 58, at 66.

Surely, if this Court was without power to determine the legal sufficiency of the allegations of the complaint in the *Bell* case because the lower court had not taken jurisdiction, the Court of Appeals for the First Circuit exceeded its powers in determining the legal sufficiency of the allegations of the complaint in the case at bar.

In discussing the decision in *Bell* v. *Hood, supra,* in his *"Commentary on the United States Judicial Code,"* Professor James William Moore places his finger directly on the reason for the error of the Court of Appeals in the case at bar, when he says (page 144):

> "Some courts have not fully understood this principle, and have, after extensive analysis of plaintiff's claim, decided that the federal law did not support it and dismissed the action for want of jurisdiction, whereas, under the analysis of *Bell* v. *Hood,* the judgment should be on the merits for the defendant."

There are sound reasons why an appellate court, in a case where it has no original jurisdiction, does not and should not have the power to determine the legal sufficiency of the allegations of a complaint where jurisdiction has not been assumed by the lower court.

In the first place, being on the merits, such a determination could not be made until *after* jurisdiction had been assumed.

Where the lower court has refused to take jurisdiction to determine a case on the merits, the appellate court cannot do so. Its powers on appeal would be limited to a consideration of the question of whether or not the lower court in fact had jurisdiction. It could not affirm the judgment denying jurisdiction on the ground the facts alleged in the complaint fail to state a cause of action on which relief could be granted, because a determination of that question would in and of itself constitute the exercise of jurisdiction. *It would amount to the exercise of original jurisdiction by the appellate court.*

In the second place, a determination of the legal sufficiency of the allegations of the complaint being on the merits, would be a bar to a further proceeding in another court and would result in a litigant's rights being precluded by the judgment of a tribunal which in fact has no jurisdiction of the subject-matter.

In the third place, if jurisdiction exists, the right of amendment exists, and the litigant would be deprived of this right by the decision of the appellate court.

In the case at bar, had the District Court assumed jurisdiction, the plaintiffs might have amended the complaint so as to set out with more clarity and preciseness their theory that the defendants had, with the express purpose and intention of denying to the plaintiffs their constitutional rights, entered into a conspiracy to deprive, and in pursuance of such conspiracy, had deprived the plaintiffs of the tax exemption to which they are entitled under the laws of Puerto Rico.

Had the Court of Appeals reversed the judgment of the District Court and remanded the case for a judgment on the merits, the plaintiffs still might have amended their complaint and remedied the defects pointed out by the Court of Appeals.[5]

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[5] The suggestion of the court below (Record 42) that this case was rendered moot by a Puerto Rican statute approved September 5, 1950, provides no proper ground for the denial of relief to petitioners. That statute, Act No. 29, Laws P. R., 5th to 12th Spec. Sess. 1951, p. 216 amends the Industrial Tax Exemption Act to eliminate entirely the functions of the Executive Council in the administration of the Act and to vest in the Governor the whole administrative disposition of applications for tax exemption. The court's suggestion involves the question of abatement of actions and subsitution of parties rather than mootness, and we submit that the provisions of Rule 25(d), Federal Rules of Civil Procedure, are not brought into play since the defendant territorial officials have neither died nor resigned, nor have they ceased to hold office within the meaning of that Rule.

This is not an action for mandamus to compel some specific action by the defendant officials, as in *Snyder* v. *Buck*, 340 U. S. 15, cited by the court below. Instead, it seeks a judgment declaring the illegality of the denial by such officials of petitioners' tax exemption application, thus establishing that such denial was null and void *ab initio*. Petitioners' application will therefore still be pending and can properly be acted on by the person who is Governor just as in the case of all other applications that were pending on September 5, 1950, when the Act was amended. Unless the results of respondents' illegal conspiracy can be undone in this way, thus restoring petitioners' application to a pending status, there is noth-

We respectfully submit that the authority of the Court of Appeals in the case at bar was limited to a determination of the jurisdictional question presented by the District Court decision from which the appeal was taken, and that its action in disregarding that question and deciding the case on the merits was an assumption of original jurisdiction and such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION.

The decision of the Court of Appeals affirming the judgment of the District Court presents a situation which has always been thought to be impossible under our form of government and system of jurisprudence.

The decision leaves your petitioners—citizens of the United States—without any tribunal whatsoever to hear their plea that they have, by the unconscionable acts of officials of the Puerto Rican Government, been deprived of rights guaranteed to them by the Constitution.

The Industrial Tax Exemption Act of Puerto Rico, under color of which the officials acted, expressly prohibiting any review, administrative or judicial, your petitioners' plea cannot be heard in the courts of Puerto Rico.

The District Judge having dismissed your petitioners' complaint for lack of jurisdiction and that judgment having been affirmed by the Court of Appeals, there is no tribunal to which petitioners can turn, unless this Court grants the writ of certiorari prayed for and it is finally

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ing on which the Governor can act, as there is no showing that the Governor has any authority to reopen or reconsider any action of the Executive Council.

In any event, if the court below took its own suggestion seriously, the only proper action for it to have taken would have been to vacate the judgment of the District Court and remand with directions to dismiss the action without prejudice to its renewal against the proper party. See *Snyder* v. *Buck*, 340 U. S. 15, 17-18, 22; *Updegraff* v. *Pace*, 188 F. 2d 646, 649 (App. D. C. 1951).

held that the District Court is required to take jurisdiction of the complaint.

WHEREFORE, your petitioners pray that a writ of certiorari be granted under the seal of this Court, directed to the United States Court of Appeals for the First Circuit, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 558.

EVERLASTING DEVELOPMENT CORPORATION, LONG CORPORATION, and L. D. LONG, *Petitioners*,

v.

SOL LUIS DESCARTES, JORGE J. JIMENEZ, VICENTE GEIGEL POLANCO, MARIANO VILLARONGA, RAMON COLON TORRES, FERNANDO SIERRA BERDECIA and JUAN A. PONS, as members of the Executive Council of Puerto Rico, and VICENTE GEIGEL POLANCO, as Attorney General of Puerto Rico, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OPINIONS BELOW.

Petitioners have applied for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 2,

1951 (R. 42).[1] The opinion of the Court of Appeals (R. 33-42) is reported in 192 F. 2d 1 (1951). That Court affirmed an order, entered on March 6, 1951, by the United States District Court for the District of Puerto Rico, granting Respondents' motion for dismissal of the complaint (R. 26). The opinion of the District Court (R. 12-26) is reported at 95 F. Supp. 954.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED.

1. Whether the Court below correctly dismissed the complaint for lack of federal jurisdiction of the subject matter, because the complaint did not "make out a case arising under the constitution or laws of the United States."

2. Whether the District Court properly dismissed the complaint because jurisdiction was barred by the Butler Act, 48 U.S.C. § 872, and under the equitable principles stated by this Court in *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293.

3. Whether, in any event, the complaint was dismissible, for lack of jurisdiction, because it raised no "case or controversy" within the meaning of Article III, Section 2 of the Constitution of the United States.

4. Whether, in any event, the complaint was dismissible, for lack of jurisdiction, because suit was brought against the Government of Puerto Rico without its consent.

5. Whether, in any event, the complaint was dismissible, for lack of jurisdiction, because petitioners had no legally enforceable right to tax exemption.

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[1] The petition for rehearing was denied on November 30, 1951 (R. 43).

STATUTES INVOLVED.

1. (a) *The Industrial Tax Exemption Act of Puerto Rico* (Laws P. R. 1948, pp. 482-514).

As its preamble states, the purpose of the Act is to develop the economy of Puerto Rico by encouraging the establishment of new industry (Laws P. R. 1948, pp. 482-486). The Act provided in substance that exemption from insular taxes might be granted to persons who demonstrated "to the satisfaction of the Executive Council" of Puerto Rico (Laws P. R. 1948, p. 494) that they had established new facilities for the production of a "manufactured product on a commercial scale", unless "in the exercise of a sound judgment", the Council found that tax exemption would accord the favored party a "substantial advantage" over competitors already producing "similar articles of commerce" in Puerto Rico (Laws P. R. 1948, pp. 492-494). In the latter event, the exemption might nevertheless be granted by the Council in the exercise of its discretion, but only if similar exemption were accorded to competitors (*id.* 494).

The Act further stipulated that "a grant of tax exemption approved by the Executive Council shall not be effective *until the same has been approved by the Governor of Puerto Rico*" (Laws P. R. 1948, p. 508) (Emphasis supplied).

The finality of determinations of the Executive Council and the Governor was prescribed as follows (Laws P. R. 1948, p. 512):

> "Section 16. All resolutions and findings of the Executive Council and of the Governor of Puerto Rico under the provisions of this Act, shall be final and no judicial or administrative proceeding shall lie against the same."

(b) *The Industrial Tax Exemption Act of Puerto Rico, as amended by Act No. 29, approved September 5, 1950* (R. 42); (Laws P. R. 5th to 12th Spec. Sess. 1950-1951, p. 216).

The effect of the amendments was to eliminate the functions of the Executive Council in respect of tax exemption and to vest entire responsibility therefor in the Governor. Section 16 was left unchanged except for the deletion of the reference to the Council.

2. (a) *Puerto Rican Act No. 232 of May 10, 1949,* authorizing taxpayers to sue in the Tax Court of Puerto Rico for the recovery of insular taxes already paid (Laws P. R. 1949, pp. 720-722).

(b) *Puerto Rican Act No. 328 of May 13, 1949,* authorizing litigation of liability for insular taxes in the Tax Court of Puerto Rico, upon the posting of a security bond by the taxpayer (Laws P. R. 1949, pp. 998-1000).

3. *The Butler Act* (48 U.S.C. § 872), which provides as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

4. *28 U.S.C. § 1331.*

5. *The Federal Declaratory Judgment Act* (28 U.S.C. §§ 2201 and 2202.

COUNTERSTATEMENT OF THE CASE.

(a) The Allegations of The Amended Complaint.

1. The amended complaint, alleging jurisdiction solely under 28 U.S.C. § 1331, was filed in the United States District Court for the District of Puerto Rico on March 3, 1950 (R. 2). A declaratory judgment was prayed that petitioners "are eligible for and entitled to tax exemption" under the Industrial Tax Exemption Act of Puerto Rico (R. 9). Named as defendants were seven individuals in their capacity as members of the Executive Council of Puerto Rico, 48 Stat. 1168, 48 U.S.C. § 777, and the Attor-

ney General (R. 3, 34). The Governor was not joined, although his approval was necessary to a grant of tax exemption (R. 3).

2. The complaint alleged that petitioners had entered into "the production and sale on a commercial scale in Puerto Rico of low-cost houses as a manufactured product . . . " (R. 3). Such houses were described as "articles of commerce" (R. 3) produced by a "new plant, factory, machine, or machine ensemble", which performed the function of "the assembly and joining of members and parts" (R. 4).

3. It was complained that defendants "granted tax exemptions to all other industrial units qualified therefor under the Industrial Tax Exemption Act of Puerto Rico" (R. 6), but "arbitrarily, capriciously, unlawfully and with intent to discriminate against these plaintiffs denied the exemptions to which they are entitled" (R. 8-9). There was no suggestion that tax exemption had been granted to any applicant similar to plaintiff or engaged in constructing houses.

4. While the case was pending before the District Court, an amendment to the Industrial Tax Exemption Act approved September 5, 1950, eliminated the Council's functions and vested sole responsibility for the grant of exemptions in the Governor (R. 42; Laws P. R., 5th to 12th Spec. Sess. 1950-1951, p. 216), who is not a party to this action.

(b) The Decisions Below.

5. The District Court sustained defendants' motion to dismiss the complaint (R. 26), holding that the action was barred by the Butler Act, 48 U.S.C. § 872, which prohibits suits in the United States District Court to restrain assessment of Puerto Rican taxes. The Court rejected the claim that no remedy was available in the insular courts, pointing out that "an adequate procedure" was specifically provided by insular law in which constitutional questions

might be litigated and, further, that under 28 U.S.C. § 1293 an appeal from the insular decision could be carried to the federal appellate courts (R. 18, 20).

6. On appeal, the United States Court of Appeals for the First Circuit, after noting that "there are other difficulties with appellant's case" (R. 34), affirmed on the ground that the "factual allegations of the complainant fall far short of setting forth a substantial federal claim within the jurisdiction of the court below under 28 U.S.C. § 1331" (R. 41-42).

(c) Petitioners' Argument.

7. Petitioners argue that the complaint "though perhaps loosely drawn and wanting in some factual allegations" (Pet. br. 10), sets forth a claim for relief directly under the Constitution of the United States. This claim, they assert, is found in the allegations of the complaint that respondents wilfully, arbitrarily, capriciously and with intent to discriminate, denied tax exemption to petitioners, and that this denial violated the equal protection and due process clauses. Petitioners also argue that the Butler Act does not bar a proceeding for declaratory judgment, or, in the alternative, that the Butler Act is not applicable because petitioners have no adequate remedy under Puerto Rican law since the Industrial Tax Exemption Act provides that the decisions of the Executive Council and the Governor of Puerto Rico shall be final "and no judicial or administrative proceeding shall lie against the same."

ARGUMENT.

1. **Introductory Statement.** The Industrial Tax Exemption Act of Puerto Rico, as its preamble recites, is designed to aid in improving the economic conditions of Puerto Rico by encouraging industrialization (Laws P. R. 1948, pp. 482-484). For this purpose the legislature provided for grant of tax exemption to restricted classes of new industries. The statute prescribes general standards of eligi-

bility for exemption and commits determinations thereunder to the judgment and discretion of the executive branch of the government.

2. The Court of Appeals Correctly Held That the Complaint Does Not State a Federal Claim.

(a) *The action does not arise under the Constitution, laws or treaties of the United States, within the meaning of Section 1331 of the Judicial Code, 28 U.S.C. § 1331.* The amended complaint shows on its face that the question presented is primarily one of local law concerning the construction of the Industrial Tax Exemption Act of Puerto Rico. Petitioners' first prayer for relief asks a declaration that they are "eligible for and entitled to tax exemption under the provisions of Act 184 of May 13, 1948 of the Legislature of Puerto Rico" (R. 9). In substance, they allege that Respondents wrongfully construed and applied the provisions of the Act. Their whole case is based on that "local" question. In such circumstances, the cause of action does not arise under the Constitution or laws of the United States for purposes of jurisdiction of the United States District Courts. *Skelly Oil Company* v. *Phillips Petroleum Co.*, 339 U. S. 667; *Gully* v. *First National Bank in Meridian*, 299 U. S. 109; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476; *Louisville and Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152.[2]

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[2] Petitioners do not challenge the validity of the Tax Exemption Act itself. Nor could they. It was long ago settled that the equal protection clause does not outlaw tax exemption statutes. *Rogers* v. *Hennepin County*, 240 U. S. 184, 191; *Bell's Gap R. Co.* v. *Commonwealth of Pennsylvania*, 134 U. S. 323, 237. The instant case differs from *Georgia Railroad and Banking Co.* v. *Redwine*, — U. S. —, 20 L. W. 4108 (decided January 28, 1952), which involved a suit to enjoin the assessment or collection of taxes which the railroad asserted were unconstitutional in that the railroad had been granted exemption from the taxes in question by its charter of incorporation and that later legislation purporting to revoke such exemption was an impairment of the obligation of contract in contravention of Article I, Section 10 of the Constitution.

Such cases as *Bell* v. *Hood*, 327 U. S. 678, and *United States* v. *Williams*, 341 U. S. 58, 66, are of no aid to petitioners. The relief sought in this case does not derive directly from the federal Constitution or laws. The right asserted here is to tax exemption under a non-federal statute. Hence, the amended complaint is *not*, as *Bell* v. *Hood* requires, "so drawn as to seek recovery directly under the Constitution or laws of the United States" (*id.* at 681); nor do "the alleged violations of the Constitution . . . form . . . the sole basis of the relief sought" (*id.* at 683). Rather, within the meaning of that case, "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction" (*id.* at 682). The federal courts will not assume jurisdiction in such cases under Section 1331 of the Judicial Code.[3]

(b) *The factual allegations are insufficient to make out a case for federal jurisdiction.* As the Court of Appeals found, the complaint merely alleges that the Executive Council of Puerto Rico "upon an erroneous interpretation of a local statute" denied tax exemption to petitioners, having properly granted it to other persons differently situated (R. 41). As the Court stated, "The complaint in the case at bar, however, carefully refrains from alleging that tax exemption has been granted to other persons in like case with the plaintiffs, engaged in the mass production of low cost housing." (*Id.*)

In these circumstances, the complaint clearly fails to state facts upon which a claim of denial of due process or equal protection of the laws may be based. The general allegations in the complaint that respondents acted "arbi-

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[3] Petitioners cite *McGrath* v. *Kristensen*, 340 U. S. 162, and *Perkins* v. *Elg*, 307 U. S. 325 (Pet. Br. 11, 12), apparently to show that federal jurisdiction may be invoked to determine "status". Both of those cases, however, concerned a preliminary question of status under a federal statute and not, as here, a demand for relief under a local tax exemption law.

trarily, capriciously, unlawfully and with the intent to discriminate" (R. 6, 8), are of no avail. Such "opprobious epithets" are meaningless (*Snowden* v. *Hughes*, 321 U. S. 1, 10; *Missouri* v. *Dockery*, 191 U. S. 165, 172).[4]

The Court of Appeals, therefore, correctly affirmed the dismissal of the complaint, on the grounds of failure to state a claim under the federal Constitution or laws. *Snowden* v. *Hughes*, 321 U. S. 1, 13. In the words of that case: "There is no allegation of *any facts* tending to show that in refusing to [exempt] petitioner[s] . . . the [Council] was making any purposeful discrimination between persons or classes" (321 U. S. at 7) (Emphasis supplied).

In the light of the foregoing principles, which the Court of Appeals correctly applied, the amended complaint in this case falls far short of meeting the requirements for the statement of a cause of action arising under the Constitution or laws of the United States and was therefore properly "dismissed for want of jurisdiction" (*Bell* v. *Hood*, 327 U. S. 678, 682).[5]

3. As the Trial Court Held, This Suit is Barred by The Butler Act.

(a) *Petitioners have an adequate remedy at law.* This suit is clearly within the ban of the Butler Act, 47 Stat. 158, 48 U.S.C. § 872, which provides:

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[4] Legislatures have the "greatest freedom" in establishing classes for tax purposes (*Madden* v. *Commonwealth of Kentucky*, 309 U. S. 184, 191), including classes of exempt institutions or property. *Rogers* v. *Hennepin County*, 240 U. S. 184, 191. Allegations of erroneous denial of an application do not raise a constitutional issue. *Charleston, etc. Ass'n.* v. *Alderson*, 324 U. S. 182, 190. The same standards governing review of challenged legislation apply to executive action. *Snowden* v. *Hughes*, 321 U. S. 1, 10.

[5] Petitioners appear to argue that the Court below merely found that the allegations of the complaint were insufficient to state a claim upon which relief could be granted, and therefore, that the case should have been remanded. (Pet. br. 6-8, 21) We need not discuss this except to point out that the Court found that the complaint did not state allegations adequate to state a claim under the federal constitution or laws.

> "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

As the trial court noted (R. 22), even if the Butler Act, like the comparable legislation applying to the states (28 U.S.C. § 1341), were limited to cases where there is "a plain, speedy and efficient" local remedy, it would bar this case. Local procedures are available whereby petitioners may litigate any constitutional questions through the Insular Tax Court, with the right of appeal to the Supreme Court of Puerto Rico and the federal appellate courts (R. 18-20). They may (i) post bond and litigate their tax liability (Laws P. R. 1949, pp. 998-1000) or (ii) pay the taxes and sue to recover them (*id.* pp. 720-722). Following the judgment of the District Court in this case, suit was in fact filed under these provisions (Case No. I-182 in the Tax Court of Puerto Rico, on September 17, 1950; see note 7, *infra*).

Petitioners challenge the adequacy of the local remedy only on the ground that Section 16 of the Industrial Tax Exemption Act accords finality to the decisions of the Executive Council and the Governor. They apparently argue that because the statute accords finality to these decisions, petitioners will be unable to obtain adjudication of their contentions in proceedings begun in the insular courts. That, of course, is without substance. The constitutionality and effect of Section 16 of the Industrial Tax Exemption Act may be adjudicated in the insular as well as in the federal courts, and petitioners may litigate before the insular courts any appropriate constitutional issues.[6]

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[6] The situation in *Georgia Railroad & Banking Co.* v. *Redwine*, *supra*, is entirely different from the instant case. In the *Redwine* case, this Court held that none of the three remedies which the State of Georgia suggested was available to appellant constituted a "plain, speedy and efficient" remedy. One of the remedies had already been held by the Georgia courts to be unavailable. As to the other two remedies, one required the filing of more than 300 separate

As the trial court stated with respect to this question (R. 20):

> "When the insular courts acquire jurisdiction by reason of the plaintiffs bringing an action pursuant to the tax appeals procedures of insular law, it will be the duty of those courts to inquire into the merits of the alleged violations of the constitutional rights of the plaintiffs and to preserve those rights unimpaired. That it is obligatory upon the Tax Court of Puerto Rico to make such inquiry is made clear by the decision in *Fiddler* v. *Tax Court*, 65 P.R.R. 189, 191-192."

The adequacy of petitioners' remedy at law is accordingly plain. *Toomer* v. *Witsell*, 334 U. S. 385, 392; cf. *Ford Motor Co.* v. *Dept. of Treas. of Indiana*, 323 U. S. 459, 470[7].

(b) *The Butler Act Governs Suits for Declaratory Relief.* The complete answer to the argument that the Butler Act does not apply to suits for declaratory judgment (Pet. Br. 14) was stated as follows by this Court in *Colgrove* v. *Green*, 328 U. S. 549, 551-2:

> "The Declaratory Judgment Act 'only provided a new form of procedure for the adjudication of rights in conformity' with 'established equitable principles.' *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 300, 63 S. Ct. 1070, 1074, 87 L. Ed. 1407. And so,

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suits in 14 different counties and the other remedy was applicable to recover less than 15% of the amount in controversy. No such obstacles are present here.

[7] The fact is that on September 17, 1951, one of the petitioners here, the Long Corporation (R. 2), filed a suit in the Tax Court of Puerto Rico challenging the assessment of taxes for the fiscal year ended May 31, 1950, in the very same situation that petitioners seek to litigate in this action. Its complaint alleged that it was entitled to tax exemption under Act No. 184 of May 13, 1948, and that the Executive Council has "erroneously, arbitrarily, unlawfully and in derogation of plaintiff's constitutional rights" refused to grant it. (Case No. I-182 in the Tax Court of Puerto Rico.)

> the test for determining whether a federal court has authority to make a declaration such as is here asked is whether the controversy 'would be justiciable in this Court if presented in a suit for injunction . . . ' "

Petitioners' view, indeed, would emasculate the Butler Act and its state counterpart. In any event, as the trial court discerned (R. 22-26), the adequacy of the local remedy would deny the exercise of federal jurisdiction on ordinary principles of equity, wholly apart from the proscription of the Butler Act. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293; cf. *Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341.

4. As the Court Below Held (R. 34), There Are Other Difficulties Which Defeat Petitioners' Action.

(a) *There is no "case or controversy" within the meaning of Article III, Section 2, of the Constitution.* The courts could not enter a legally effective order in this case. The only defendants are the members of the Executive Council. The Governor is not a party. Tax exemption could not become effective under the statute as it was in effect when the complaint was filed, without the approval of the Governor (Laws P.R. 1948, p. 508). While this action was pending in the District Court and long before it entered its judgment, the functions of the Executive Council were eliminated and vested entirely in the Governor (R. 42; Act No. 29, approved September 5, 1950, Laws P.R. 5th to 12th Spec. Sess. 1950-1951, p. 216). Consequently, under either the original or the amended legislation, the complaint did not permit the entry of an order legally effective to establish petitioners' rights as against the officials vested with final authority. A judgment that petitioners were entitled to tax exemption—an indispensable premise to a finding for petitioners on the constitutional issues—would have been "an advisory opinion in its most

obnoxious form." (*Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103, 113.[8]

(b) *This is a suit against the Government of Puerto Rico to which it has not consented.*

This is in substance an action against the Government of Puerto Rico. This Court has "previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding" (*Ford Motor Co.* v. *Department of Treasury of State of Indiana*, 323 U.S. 459, 464). Since petitioners seek a determination of tax exemption which respondents could have granted only in their collective official capacity as the Executive Council of Puerto Rico, the suit must necessarily fail as one against the sovereign. *Ford Motor Co.* v. *Department of Treasury of State of Indiana, supra; Worcester County Trust Co.* v. *Riley*, 302 U.S. 292; *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682. The issue is particularly clear here since the relief sought is "affirmative" action by respondents—the issuance of a certificate of tax exemption. To quote the Court in the *Larson* case, supra (337 U.S. at 691, footnote 11):

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionable sovereign property."

See also *Georgia Railroad & Banking Co.*, v. *Redwine, supra*, 20 L. W. at 4110, footnote 15. The character of the suit as one against the sovereign is, of course, unaffected

[8] Considering the purpose and provisions of the Insular Exemption Act, even if the Governor had been joined, judicial power would not be exercisable to control his action (*Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112.)

by the circumstance that the prayer for relief seeks only a declaratory judgment. See, e.g., *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375, and note 4.

(c) *Tax Exemption is a Bounty to Which There Is No Legally Enforceable Right.*

This Court has repeatedly characterized statutes granting tax exemption as conferring no rights, but only "a mere gratuity or bounty" (*Grand Lodge of Louisiana* v. *New Orleans*, 166 U.S. 143, 149). *Christ Church* v. *Philadelphia County*, 24 How. 300, 16 L. Ed. 602; *East Saginaw Salt Mfg. Co.* v. *East Saginaw*, 13 Wall. 373, 20 L. Ed. 611; *Tucker* v. *Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *West Wisconsin R. Co.* v. *Board of Supervisors of County of Trempealeau*, 93 U.S. 595, 23 L. Ed. 814; *Welch* v. *Cook*, 97 U.S. 541, 24 L. Ed. 1112; *Wisconsin & M. R. Co.* v. *Powers*, 191 U.S. 379. Moreover, it has long since been established that tax exemption may be constitutionally accorded to some and withheld from others, notwithstanding the equal protection clause of the federal Constitution. *Bell's Gap R. Co.* v. *Commonwealth of Pennsylvania*, 134 U.S. 232, 237; *Missouri* v. *Dockery*, 191 U.S. 165, 171; *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad Company*, 18 Wall. 206, 225, 21 L. Ed. 888, 894.

The jurisdiction of the courts over petitioners' claim of right to tax exemption was thus effectively barred, particularly in light of Section 16 of the Tax Exemption Act. "To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies" (*Stark* v. *Wickard*, 321 U.S. 288, 306). See also *United States ex rel. Burnett* v. *Teller*, 107 U.S. 64, 68; *Frisbie* v. *United States*, 157 U.S. 160, 166; *Mobile & O. R. Co.* v. *Tennessee*, 153 U.S. 486, 501.

CONCLUSION.

We respectfully suggest that the attempt to invoke federal jurisdiction in this situation is directly counter to the decisions of this Court and the development of Congressional policy, both of which have increasingly insisted upon fully recognizing the jurisdiction of Puerto Rico institutions of government, and upon narrowly restricting federal jurisdiction.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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